Filed 3/4/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND ANNIN, Defendant and Appellant.	A099237 (San Mateo County Super. Ct. No. 49322)

Raymond Annin (appellant) appeals his conviction for violating Penal Code section 290, subdivision (f)(1).[1] The court also found true allegations that he had four prior convictions qualifying as strikes under the Three Strikes law, and found true an enhancement pursuant to section 667.5. The court denied his motion to strike one or more of the strike priors, and sentenced him to a term of 25 years to life, plus one year for the enhancement.

Appellant raises numerous issues on appeal, including challenging the sufficiency of the evidence, several claims of instructional error, ineffective assistance of counsel, and due process and equal protection challenges to section 290. He also contends that his sentence constitutes cruel and unusual punishment under the state and federal constitutions. We shall affirm the judgment.

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* Under California Rules of Court, rules 976(b) and 976.1, only the Facts section, Parts I and II of the Analysis section, and the Conclusion are certified for publication.

[1] Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

FACTS

On November 8, 1998, appellant was released on parole. He registered as a sex offender in Redwood City on November 10, 1998, and last registered on August 26, 1999. During that time period, he filed 10 forms in Redwood City to report a change of address, or that he was within the jurisdiction as a transient, meaning that he had no address. On three occasions, the form he filed indicated that he was a transient.

In March of 1999, his case was transferred to Steve McCoin, a parole agent for the California Department of Corrections in Redwood City. McCoin met with appellant every month to review his obligations as a parolee, including the sex registration requirements pursuant to section 290. McCoin informed appellant that the failure to comply with registration requirements would constitute a parole violation.

On August 25, 1999, McCoin met with appellant at his office. Appellant stated that he was about to become homeless, and they discussed the possibility of appellant obtaining another voucher for housing at the Garden Motel in Redwood City. McCoin also informed appellant that he would have to " re-register"[2] to notify of his new address or location with the Redwood City Police Department if he changed his address again. Appellant indicated that he understood this obligation.

On August 31, 1999, McCoin made a routine unannounced visit on appellant at the Garden Motel, where they again discussed the fact that appellant was soon going to be homeless. In response to McCoin's directions, appellant came to his office on September 1, 1999, and reported that he was now homeless. McCoin told appellant that he could not provide him with a housing voucher for that week, and that he should meet with McCoin again on September 8, 1999, to discuss the possibility of a voucher or loan. He also reminded appellant that he would have to notify the Redwood City police that he

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[2] Most of the witnesses referred to the requirement pursuant to section 290, subdivision (f)(1) that the registrant notify the law enforcement agency last registered with of a change of address or location, as "registration" or "re-registration." The duty to notify of a change in address or location is indeed one of the obligations of a registered sex offender under section 290. However, for the sake of clarity, we shall refer to this obligation as the "duty to notify."

was now homeless. Appellant did not report to the September 8, 1999 appointment, and a week later McCoin requested that a warrant issue for appellant as a parolee-at-large.

The manager of the Garden Motel testified that the records showed that appellant stayed in the Garden Motel from July 14 through July 20, 1999, and again from August 25 to August 31, 1999. Both times he paid with a voucher. The records also showed that he did not stay at the motel after August 31, 1999.

A Redwood City Police Department detective testified that he was the custodian of the sex-offender records. The records showed that appellant had registered, or notified of a change of address 10 times. In December of 1998, appellant registered at an apartment building on Linden, and judging from the date of his next notification of change of address, he continued to live there until July 7, 1999. On three occasions appellant notified the department that he had changed his address and was "transient." One of these occasions was on August 20, 1999. On August 26, 1999, appellant filed his last notification of a change of address, which he gave as the Garden Motel, room 8.

On August 26, 1999, when appellant filed this last registration form notifying the police of his change of address, appellant also signed a statement acknowledging that he had been notified of his duty to register as a convicted sex offender under section 290. He placed his initials in a box acknowledging that he read the admonition: "If I move out of California, I am required to register in any state in which I am located or reside, within 10 days, with the law enforcement agency having jurisdiction over my residence or location." He also specifically acknowledged having read the admonition: "When changing my residence address, either within California or out of state, I must inform the registering agency with which I last registered, of the new address . . . as a sex offender within five working days."

In October 1999, Officer Garcia, who had processed appellant's August 26 registration form, noticed that appellant had failed to register in October, within five days of his birthday. Appellant's parole agent informed Garcia that appellant was also in violation of his parole, and that his whereabouts were unknown. Garcia checked the state registration system and discovered that appellant had not registered anywhere else.

Garcia also identified a fingerprint card dated November 10, 1998, signed by appellant, acknowledging the following: "I understand my requirement as stated in the appropriate code sections. [¶] When registering pursuant to 290 PC, my requirement to register is for life and I must, within five working days, register with the agency having jurisdiction over my residence address. Notify the last registering agency when I leave their jurisdiction and report any name change to the registering agency. [¶] Annually, within five working days of my birthday, I must update my registration address, name, and vehicle information. [¶] . . . [¶] If I am designated either a sexually violent predator, or transient, or homeless, I must update my registration at least once every 90 days, and annually within five working days of my birthday."

Garcia also identified a notice of registration requirement dated May 22, 1998, signed by appellant, and containing his thumbprint. Garcia testified that this card is explained to prisoners when they are released from custody. It summarized the requirements of section 290 and listed registration dates for appellant, with more detailed summaries of the registration information for each date.

In January 2001, appellant's parole agent notified Garcia that appellant had been arrested in Portland, Oregon. Officer Garcia and a Detective Dolezal went to interview appellant at San Quentin. Appellant admitted that he signed the August 26, 1999 registration form, and initialed all the registration requirements on the form. When Garcia asked appellant why he left California, appellant stated that he was tired of California, and used his social security check to buy a bus ticket to Portland, leaving around September 7 or 8, 1999. He stayed there for 14 months. When asked why he did not register before he left, appellant stated that he knew if he told the police department that he was moving to Oregon, they would contact his parole agent to "verify that [it] was okay . . . and he knew it wasn't okay, and he would be violated and arrested." Appellant told Garcia he thought about informing the Redwood City Police Department, but knew if he did so, he would be arrested. A recording of the interview was played for the jury. In the interview, when Garcia asked appellant whether ". . . [he was] aware that by leaving, that [he was] . . . violating . . . the 290 requirement" appellant responded, "I knew that I

was violating my parole[,] yes." Appellant also told Garcia, "[T]here's really no good reason why I didn't report and let you know. There's really . . . no excuse . . . . There's no excuse for what I did."

Appellant testified that when he was paroled into Redwood City in 1998, he understood the registration requirements that applied to him, and that there was "no mistake" in his mind "whatsoever." When he was first released he used a voucher to live at the Garden Motel. When the time ran out on the voucher, he lived on the street as a transient. He also shared an apartment on Linden for several months, but had to move because it became overcrowded, and he could not afford it. Every time he became homeless he would "go down and register" with the Redwood City Police Department. He was not qualified to stay in homeless shelters because of his record as a sex offender. When defense counsel asked, "[W]hat is it that [led] you to think that you had to leave without registering?" appellant explained that he "had no choice." He knew he would not have to live on the street in Portland because the cost of living was lower, and he had friends and family there. His parole officer had told him it would be impossible to serve his parole in Oregon. He therefore felt that he had to "just leave without notifying the police." Appellant acknowledged that he understood everything on the registration form he filed with the Redwood City Police Department in August of 1999, and that he "knew that by going to Oregon, [he] would be out of compliance with [his] registration," but "went anyway."[3] On cross-examination, appellant stated that once he got to Oregon he

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[3] After the court denied appellant's request for instructions on the necessity defense, the apparent defense strategy, in light of the admissions appellant had made in his interview, was to present evidence of the circumstances that forced appellant to be homeless in Redwood City, and his belief that he had no choice but to fail to comply with subdivision (f)(1), so he could relocate to Oregon and stay with friends or family. That strategy was based on the possibility that his honest testimony would either lead to jury nullification or would influence the court to grant a motion to strike some or all of the alleged prior strike convictions. It was a reasonable strategy, especially in light of the severity of the penalty if sentenced as a third strike.

Appellant, by way of a separate petition for habeas corpus (*In re Annin*, deferred pending consideration of appeal Dec. 17, 2003, A104846), contends, inter alia, that the adoption of this strategy, and particularly the failure of defense counsel to advise him

did not stay with family. Instead, he stayed with friends, "kids I went to school with," and stayed in Oregon for 14 months. When the district attorney reminded him that he had told Officer Dolezal that he stayed in motels, appellant explained that he did not want to involve his friends. He did stay in motels when he first arrived, and when he had money.[4]

ANALYSIS

I.

Substantial Evidence of Section 290, Subdivision (f)(1) Violation

A. Summary of Relevant Statutory Provisions

In 1999, section 290, subdivision (a)(1)(A) (subdivision (a)(1)(A)) provided:

"Every person [who has a prior conviction for a specified offense], for the rest of his or her life while residing in, or, if he or she has no residence, while located within California, shall be required to register *with the chief of police of the city in which he or she is residing,* or if he or she has no residence, is located . . . *within five working days of coming into, or changing his or her residence or location within, any city* . . . in which he or she temporarily resides, or, if he or she has no residence, is located." (Italics added.)

Section 290, subdivision (f)(1) (subdivision (f)(1)) provided, in relevant part:

"If any person who is required to register pursuant to this section *changes his or her residence address or location,* whether within the jurisdiction in which he or she is currently registered *or to a new jurisdiction inside or outside the state*, the person shall inform, in writing within five working days, *the law enforcement agency or agencies with which he or she last registered of the new address or location.*" (Italics added.)

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against testifying, constituted ineffective assistance of counsel. We shall deny the petition by separate order.

[4] The jury heard only a portion of appellant's taped interview with Garcia and Detective Dolezal. The prosecutor was referring to another portion of the interview, in which appellant had acknowledged that his parole placed restrictions on seeing his daughter, who was one of his victims, and that he did not see his family while in Oregon. Instead, he stated he stayed in "apartments . . . I mean motels, motels."

Subdivision(f)(1) also provided that the enforcement agency the registrant last registered with shall forward the information the registrant provides to the Department of Justice, which shall then promptly notify the law enforcement agency "having local jurisdiction of the new place of residence or location."

One of the purposes of the requirement in subdivision (f)(1) that the registrant notify the authority *last registered* with of a *change* in address, is to preclude a registrant who leaves one jurisdiction for another from attempting to disappear from the registration rolls by not complying with the duty under subdivision(a)(1)(A) to register in the new jurisdiction. This is accomplished by requiring the information the registrant provides to the authority *last registered with* to be forwarded to the Department of Justice, which in turn will provide it to the local law enforcement agency having jurisdiction over the new place of residence. (See *Wright v. Superior Court* (1997) 15 Cal.4th 521, 527 [section 290's purpose of ensuring that offender's whereabouts are known to police "depends upon timely change-of-address notification. Without it law enforcement efforts will be frustrated and the statutory purpose thwarted"].) Also, because no single nationwide registration system has been established, compliance with subdivision (f)(1) ensures that, if a California registrant leaves the state, the local law enforcement agency in the state where the registrant relocates is at least alerted to the presence of a former sex offender within the jurisdiction, and has the opportunity to enforce that state's registration law, if it has one.

B. Evidence of a Subdivision (f)(1) Violation

The amended information alleged, and the jury found, that between September 5, 1999, and January 11, 2001, appellant willfully violated subdivision (f)(1)

There was overwhelming evidence that appellant moved out of the Garden Motel, his last registered address in California, and moved to Portland, Oregon. There was also substantial evidence that appellant did not notify the Redwood City Police Department that the Garden Motel was no longer the address where he was staying. Nor did he provide any other information concerning his whereabouts for 14 months.

The testimony of several witnesses, including appellant's own, established that he last registered with the Redwood City Police Department on August 26, 1999, and at that time he gave his address as the Garden Motel. The testimony of Patel, the hotel manager, established that appellant did not live at that address after August 31, 1999. The testimony of Officer Garcia and McCoin established that appellant did not thereafter provide any notification to the Redwood City police that he was no longer living at the Garden Motel, or any other information regarding his whereabouts. He was considered a parolee at large until he was arrested in Oregon, 14 months later. Appellant testified that he moved out of the Garden Motel and, on or about September 7, left the jurisdiction of Redwood City and moved to Portland, Oregon where, for the next 14 months, he stayed with friends or in motels.

There was also substantial evidence that appellant "willfully" failed to notify the Redwood city police that he could no longer be found at his registered address at the Garden Motel, and had moved to Oregon.[5] Appellant testified that he "knew that by going to Oregon, [he] would be out of compliance with [his] registration." He told Officer Garcia that he left anyway, because he knew that if he gave the Redwood City Police Department this information they would notify his parole officer, and he would be arrested for a parole violation..

Appellant nevertheless contends that the evidence was insufficient to support a finding that he violated subdivision (f)(1). He construes subdivision (f)(1) to impose no duty to notify the Redwood City Police Department that he *changed* his "residence address or location," unless and until he acquired a new one. From this premise, he argues that there was no substantial evidence that he had a new address or location, and in the absence of evidence that he had a new address or location, he had no duty under subdivision (f)(1) to notify the Redwood City Police Department that he had moved from

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[5] In section III, *post*, we discuss the evidence of a "willful" violation more fully, in the context of appellant's contention that the failure of the court to instruct on the requirement that he have actual knowledge, as required by *People v. Garcia* (2001) 25 Cal.4th 744, 754, resulted in prejudicial error.

his last registered address to Oregon. He concludes that the five-day grace period for notification of a change of address or location was never even triggered, and thus, no violation occurred.

Even if we accept appellant's construction of subdivision (f)(1), his contention fails because there was substantial evidence that he had a new "address" in Oregon. Appellant testified that when he was in Oregon he stayed with friends, or in motels, for the duration of his 14-month stay. Appellant argues that this is insufficient evidence that he had an "address," because there was no evidence that any of the addresses where he stayed were places to which he intended "to return, as opposed to a place where one rests or shelters during a trip or transient visit."[6] He suggests that because he did not specify the length of time he stayed at each place, or identify any *particular* address or addresses where he stayed in Oregon, he might have stayed no more than a day at a time with any one friend or at any one motel. He concludes that there was no substantial evidence that he had a residence address, because wherever he stayed during his 14 month absence, these were only places where he was passing through on a "transient visit," staying no more than a day at a time, as opposed to places to which he "intend[ed] to return."

It is axiomatic that substantial evidence includes all reasonable inferences that may be drawn from the evidence, and that in reviewing the sufficiency of the evidence this court must draw all reasonable inferences in support to the judgment, "presume . . . the existence of every fact the trier could reasonably deduce from the evidence," and may not reweigh the evidence. (*People v. Lewis* (1990) 50 Cal.3d 262, 277; *People v. Edgar* (2002) 104 Cal.App.4th 210, 218.) Appellant's lack of specificity about precisely where he stayed, and for how long, simply does not preclude the *reasonable inference* that, with respect to one or more addresses, his stay was more than merely a "trip" or a

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[6] The jury was given an instruction that defined "residence" as "a temporary or permanent dwelling place which one keeps and to which one intends to return, as opposed to a place where one rests or shelters during a trip, or a transient visit." If anything, this definition, derived from *People v. Horn* (1998) 68 CalApp.4th 408, 414-415, was arguably slightly more restrictive than the statute requires because it approximates the more exclusive concept of "domicile."

"transient visit." There was substantial evidence that he was not living on the streets, and wherever he stayed, it was a place, or places, with an address. Appellant testified that he moved to Portland, Oregon, so that he could stay with friends or family, and *avoid* living on the streets, as he was often forced to do in Redwood City. Once he arrived, he achieved his goal of avoiding the life of a transient by staying either with friends or in motels. The evidence also supported the reasonable inference that one or more of these addresses was a place to which appellant intended to return, as opposed to a "transient visit," and that he stayed at one or more of these places for more than a day at a time. According to his testimony he stayed either with friends or in motels for the next *14 months,* and he inferably intended to continue to do so if he had not been arrested.[7] Thus, although he was vague and evasive about where precisely he stayed, and for how long, presumably out of concern for those who sheltered him, the jury could reasonably infer that he regularly returned to one or more address, either with friends or in motels, during his 14-month stay in Oregon, and would have continued to do so if he not been arrested.[8] Finally, because "residence address" includes multiple addresses (see *Horn, supra,* 68 Cal.App.4th at pp. 415-418), even if he stayed with more than one friend at different addresses, or one or more motels, during that 14-month period, it was still a reasonable

[7] Appellant also suggests, in a letter brief, that Division Three of this court, in the recent decision, *People v. North* (2003) 112 Cal.App.4th 621, construes "residence address" to mean a place where the registrant stays for at least five days. The discussion in *North* regarding the definition of "residence address" is dicta because the *North* court, in an attempt to define "location," considered, but ultimately rejected, the possibility of defining "location" as a residence equivalent. (*Id.* at pp. 631-632.) Assuming arguendo that "residence address" is defined, as appellant suggests, for purposes of the sufficiency of the evidence, for the same reason that it is inferable that appellant's stay, at one or more of these places, was for more than a day, the evidence also permits the inference that over the 14-month period, he stayed for at least five days at one or more addresses.

[8] Appellant did not claim not to have known where he was going when he left the Garden Motel, or that while in Oregon he was homeless, or that he moved so often that he did not know what address to provide. Instead, he admitted in his interview with Dolezal and Garcia that he did not notify the police that he was moving to Oregon, because he knew that to do so violated his parole.

inference that he had at least one or more residence addresses, yet failed to notify Redwood City authorities of any of them.

We conclude that there was substantial evidence that appellant had one or more new addresses in Oregon, and violated his duty under subdivision (f)(1) by failing to notify the Redwood City Police Department that he had changed his address. We therefore need not reach appellant's contention that there also was no substantial evidence that he had a "location" in Oregon.

Because it underlies many of his other claims of error, we next address appellant's premise that the duty to notify of a *change* of address as defined by subdivision (f)(1) does not arise, unless and until a new address is acquired. Simply put, under his construction, the registrant is not required to report "that he has *changed* his residence (or location), but only the *new address or location*. If a person changes his residence (or location) and does not yet have a new address or location, then he has no duty to report anything." Appellant asserts this is the only reasonable construction of subdivision (f)(1) because notification of a change cannot be made without provision of a new address or location. Under appellant's construction, a person subject to the registration requirement of section 290 would have no duty, when leaving his last registered address, to inform the law enforcement authority with whom he last registered that he can no longer be found there, or to provide any information at all concerning his whereabouts, as long as he continues to change, on a daily basis, the place where he or she stays. If we were to accept appellant's construction, then the time period during which law enforcement agencies would have incorrect, outdated information concerning the offender's whereabouts could be extended from five days to a period of indefinite duration, controlled entirely by the offender, allowing the offender simply to disappear, as appellant did here, for lengthy periods.

Appellant's suggested construction of subdivision (f)(1) would defeat the clear legislative purpose of section 290. In *Wright v. Superior Court, supra,* 15 Cal.4th 521, 529, the court observed that tracking the whereabouts of sex offenders can be difficult because" 'sex offenders often have a transitory lifestyle or deliberately attempt to keep

their movements secret.' " The legislative " 'purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future.' [Citations] . . . Plainly, the Legislature perceives that sex offenders pose a 'continuing threat to society' (*United States v. Bailey* (1980) 444 U.S. 394, 413), and require constant vigilance[9]. . . . [¶] Supplemental address change information helps law enforcement agencies keep track of sex offenders who move within the same city or county or are transient. In large cities such as Los Angeles or huge counties like San Bernardino, where offenders can easily relocate without reregistering, section 290(f)[(1)] seeks to prevent them from disappearing from the rolls. Ensuring offenders are 'readily available for police surveillance' [citation] *depends on timely change-of-address notification.* Without it law enforcement efforts will be frustrated and the statutory purpose thwarted." (*Wright v. Superior Court*, at p. 527, italics supplied.)

With this legislative objective in mind, the courts have interpreted a "change" of address to include the addition of another address (see *People v. Vigil* (2001) 94 Cal.App.4th 485, 497), and to include the duty to register multiple addresses (see *Horn, supra,* 68 Cal.App. 4th at pp. 415-419) even before the amendments to section 290 made that duty explicit. (See § 290 subd,(a)(1)(B).) Viewed in light of the same objective, the duty to notify under subdivision (f)(1) must arise upon a *change* of address, and common sense dictates that whenever a person moves out of the last registered address he or she will either have a new address, or a new "location," of which to notify, within five days. The statutory language presumes that a change normally entails acquiring a new address when leaving the old one, and therefore the offender should normally be able to notify authorities of a new address within the five-day period. Nevertheless, if the registrant "changes" the last registered address by moving out, and

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[9] Similar concerns about the risk of reoffending posed by certain sex offenders underlie the Sexually Violent Predator Act. (Welfare and Institutions Code § 6600 et seq.)

does not have a new address of which to provide notification, he or she may comply with subdivision (f)(1) by notifying of a new "location," meaning, in this context, simply a place where the registrant can be found that has no address. This construction insures that if a registered offender moves, it will be no longer than five days before the registrant must inform the police of his whereabouts.[10] (See *People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [statute should be construed based upon its plain language and in light of the legislative intent and in harmony with its other provision].)

We are aware of the hypothetical difficulties that may be posited in defining what is a "location," especially as applied to a transient registrant who has no address. (See *North*, *supra*, 112 Cal.App.4th 621.) Nevertheless, a registrant who moves from his last registered address will always have either an "address," or at least a "location," of which to notify the authorities within the five-day period. Despite the difficulties that may arise

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[10] Appellant's reliance upon *People v. Franklin* (1999) 20 Cal.4th 249 in support of his assertion that the duty to notify under subdivision (f)(1) does not arise until the registrant establishes him or herself at a new address, is misplaced. The court in *Franklin* addressed the very narrow, and different, question whether a registrant had a duty to notify California law enforcement authorities of his change of address when he moved from California to Texas *prior to the effective date of an amendment to section 290*, which now explicitly provides that the duty to notify of a change in address applies when a registrant moves to a new jurisdiction outside the state. (*Id.* at pp. 251-252.) The defendant argued that because subdivision (a)(1) contained language describing the duty to register, "while residing in California," he reasonably assumed that, when he left California, and established residency in Texas, none of the provisions of section 290, including the duty to notify of a change in address, applied to him. (*Id.* at p. 254.) The court agreed that, prior to the amendments, the statute was at least ambiguous as to whether a person who changes his or her address by becoming a resident of a different state nevertheless must provide change of address notification. The court therefore gave the defendant the benefit of the interpretation in his favor, reasoning that he had established residency in Texas, before the 10-day notification period expired, and therefore no violation occurred while he was residing in California. (*Id.* at pp. 255-256.) Apart from the obvious distinction that the *Franklin* court was addressing a *prior* version of the statute and a different question of statutory interpretation, the *Franklin* court did state that "[c]hange of address notification was required within 10 days *of moving*." (*Id.* at p. 256, italics added.) Also, its analysis stating that the 10-day period expired "after defendant established residency in Texas" appears to assume that the 10-day period was triggered as soon at the defendant left his last registered address.

in defining "location" in some hypothetical factual contexts, here, if appellant did not have an address in Oregon, he might at least have notified the Redwood City Police Department that he was relocating from its jurisdiction to Portland, Oregon. Had he done so, the purpose of subdivision (f)(1) would have been served because local law enforcement in Portland would at least have been informed of the presence of a registered sex offender within their jurisdiction. Instead, he provided no information at all, not because he did not know what information to provide, but rather because he knew if he provided any information he would be found and arrested for violating his parole. In this case there was substantial evidence that appellant had one or more address, and failed to provide notification of any of them.

II.

Due Process Challenge to Section 290

Appellant also advances a due process challenge to section 290, subdivisions (a)(1)(A) and (f)(1) on the ground that the terms "location" and "is located" as used in these subdivisions are unconstitutionally vague. Specifically, he contends that persons required to register under these subdivisions have insufficient notice of what a location is, and what constitutes a change of location, and therefore are unable to determine whether, or when, they have a duty to register, or where they should register, under subdivision (a)(1)(A), and when and whether they have relocated, necessitating notification of the last registering agency of the change, under subdivision (f)(1).

In support of his argument that the terms "location" and "is located" are vague, appellant hypothesizes a multitude of factual scenarios involving the application of the challenged terms to persons who are homeless, moving during the day among various places and sleeping at different encampments, shelters, or wherever they can find on the street. He also contends that the vagueness of these terms authorizes or encourages discriminatory enforcement. (See, e.g., *City of Chicago v. Morales* (1999) 527 U.S. 41, 56-58 [criminal statute may be void for vagueness if it fails to provide notice of the conduct prohibited, or if it authorizes arbitrary or discriminatory enforcement].)

The arguments with respect to subdivision (a)(1)(A) are irrelevant, because appellant was convicted only of violating subdivision (f)(1). With respect to subdivision (f)(1), Division Three of this district recently held that the term "location" in this subdivision*, as applied to a transient sex offender,* is unconstitutionally vague*. (North, supra*, 112 Cal.App.4th 621.) The defendant in that case was convicted of violating section 290, subdivisions (a)(1) and (f)(1) when he left his last registered address and became a transient, sleeping on the streets or in bus stations, and changing the place where he stayed nightly. He testified that he knew he could register as a transient. However, he had been told by the local law enforcement authority with which he last registered that, even if he was sleeping on the streets, he had to provide an address, and he had "no idea" what address to provide because he was constantly moving during the period of homelessness. (*Id*. at pp. 626-627.) In a narrowly written opinion, Division Three held that, as applied to a *transient sex offender* who does not have an address, the term "location" in subdivision (f)(1) is unconstitutionally vague, and reversed his conviction for violating subdivision (f)(1). Although it held the term "located" in subdivision (a)(1)(A) was *not* unconstitutionally vague as applied to "re-registration after a change from residential to transient status," it nevertheless reversed the conviction under that subdivision as well, finding insufficient evidence of actual knowledge, because the defendant had been misinformed that he had to provide an address even if he were homeless, and he had testified that he "had no idea" what address he could or should provide, because, after leaving his last registered address and becoming homeless, he was moving constantly.

The decision in *North, supra*, 112 Cal.App.4th 621, however, expressly limits its holding to the application of subdivision (f)(1) to a *transient* sex offender, because of the failure of the statute to clarify the term "location" and what constitutes a change in location. The court found no vagueness problem with respect to the notification requirements of subdivision (f)(1) as it applies to "changes of address." (*North,* at p. 635.) Appellant's conviction for violating subdivision (f)(1) does not depend upon the application of the term "location," because appellant was not a transient sex offender who

was convicted of changing from one "location" to another, or from an address to a "location," without notification to the authority with whom he last registered. This is not a case where, for example, a person is homeless and changes the place where he sleeps from under the freeway to a nearby doorway, and then is prosecuted under subdivision (f)(1) for failing to notify of a change in "location." Instead, appellant was last registered at the residence address of the Garden Motel and, according to his own testimony, he left the Garden Motel and moved to Oregon to *avoid* living on the streets as a transient. As we held in Section I, *ante*, there was substantial evidence that he last registered in Redwood City at the Garden Hotel address, and that he changed his address to an address or addresses in Oregon without providing notification to the Redwood City police. Therefore, the decision in *North,* declaring subdivision (f)(1) unconstitutionally vague as applied to a sex offender who leaves his last registered address and becomes homeless, simply has no application to the facts of this case.[11]

We therefore do not address appellant's contention that in order to have a "location", within the meaning of subdivision (f)(1), "he would have to be present at it for five consecutive days." (See *North, supra,* 112 Cal.App.4th at pp. 634-635.) This case simply does not present any issue concerning the meaning of the terms "location" or "is located." Appellant was convicted of violating subdivision (f)(1) based upon substantial evidence that he moved out of his last registered address and failed to notify the Redwood City Police Department of his new address. Appellant therefore lacks

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[11] A defendant who falls "squarely within" the reach of a statute has no standing to challenge its vagueness as it "might be hypothetically applied to the conduct of others." (*Parker v. Levy* (1974) 417 U.S. 733, 756; see also *Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 492.) We therefore decline to consider the various factual scenarios appellant poses concerning the application of the term "location" to a person who is or becomes homeless, and the difficult questions these factual scenarios pose in terms of whether the statute provides notice to a transient person as to when they have changed a location, and what the new location might be.

standing to assert a due process challenge based upon the vagueness of these terms. (*Bowland v. Municipal Court, supra,* 18 Cal.3d at p. 492.)[12]

III.

Failure to Instruct on Element of "Actual Knowledge" and Instruction that Lack of Knowledge is Not a Defense

Appellant next asserts that the trial court erred by (1) failing to instruct the jury that in order to conclude appellant *willfully* violated subdivision (f)(1) by failing to notify of his change in address it had to find he had actual knowledge of his duty under that subdivision, and (2) instructing the jury that "ignorance of the law is no excuse" pursuant to CALJIC No. 4.36. (*People v. Garcia* (2001) 25 Cal.4th 744, 754.[13] We conclude, as did the court in *Garcia,* that the error was harmless beyond a reasonable doubt.

In *Garcia,* the defendant was charged and convicted of willfully failing to register as a sex offender under section 290, subdivision (a)(1). At trial he admitted that, after having been released on parole, he never registered as a sex offender under section 290, subdivision (a)(1). His defense to the charge of a willful violation was that "he was unaware he was required to register as a sex offender, and no one had advised him of that

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[12] We also note that it is possible to give "location" a reasonable and practical construction, in the factual context where a registrant violates subdivision (f)(1) by leaving his last registered address in a jurisdiction, and entering a new jurisdiction within or outside the State of California where he does not have an address. In that event, the offender is at least "located" or has a "location" somewhere within the new jurisdiction. If "location" in the context of an interjurisdictional change of address or location were construed to mean "jurisdiction," then by informing the last registering agency that the registrant is now in another jurisdiction, even without an address, the statutory objective of tracking the whereabouts of sex offenders is met by at least allowing the last registering agency to notify law enforcement in the new jurisdiction of the offender's presence within their jurisdiction.

[13] Our Supreme Court has granted review in *People v. Barker*, a decision of Division Three of this District, 107 Cal.App.4th 147, review granted June 11, 2003, S115438, in which the court held, among other things, the instructions in that case, which did not include an "ignorance of the law is not an excuse" instruction, did not result in prejudicial error. The instructions given here, however, are essentially indistinguishable from the instructions the *Garcia* court held were erroneous. (*Garcia*, *supra*, 25 Cal.4th 744, 750-751.)

requirement." (*Garcia, supra,* 25 Cal.4th at p. 748.) The court held that the instructional error was harmless beyond a reasonable doubt, because the "prosecution presented strong evidence" that the defendant actually knew of the registration requirements, which largely consisted of evidence that he had been repeatedly notified of the requirements. (*Id.* at p. 755.) The only evidence that he did not actually know of the registration requirements was his own testimony that, although he signed the notice that explained his duty, he never read it, and nobody ever explained the requirements to him. The court concluded that the jury must have discredited this testimony because, under other instructions, it was required to, and did, find that he had actually read the form. (*Ibid.*)

Although the jury in this case did not receive the same instructions under which the *Garcia* court found the jury must have resolved the conflict in the evidence in that case, that distinction is irrelevant, because appellant never testified, or even argued, that he did not have actual knowledge of the requirements specified in subdivision (f)(1). Nor, did he contend that he did not understand how these requirements applied to his move to Oregon. He also never testified that he was confused, or did not understand that he had changed his address, or even that he was confused about whether he had either a new "address" or "location" to report to the Redwood City Police Department.

The evidence that appellant had been notified of his registration requirements, understood them, and made a conscious decision not to comply, was not merely strong; it was uncontradicted: Between November 1998 and August 1999, appellant filed registration forms with the Redwood City Police Department 10 times, including filing notification each time he changed his address to another one, or became homeless. Each time he registered, he signed a form that acknowledged he had been notified of his duty to register as a sex offender, and that he had "read, understood, and initialed each registration requirement as specified on the reverse side of the form." On the reverse side of the form he initialed the box specifying each registration requirement, including the admonition, "When changing my residence address, either within California or out of state, I must inform the registering agency with which I last registered, of the new address . . . as a sex offender . . . within five working days." He also signed the

Department of Justice form, which stated that he understood, among other things, that "my requirement to register is for life and I must, within five working days . . . [n]otify the last registering agency when I leave their jurisdiction."

The most compelling evidence was appellant's own testimony that he understood the requirements to register, that he "understood everything on the form." Appellant also specifically acknowledged that he understood his obligation under subdivision (f)(1) to notify the Redwood City Police Department whenever he moved out of a last registered address and became homeless. He testified that "every time I was without a place to stay, I would go down and register." Therefore, when he had an address, he registered at that address, and when he did not, he would notify the Redwood City police that he was no longer at the last registered address and that his new location was within the jurisdiction as a "transient." Appellant also testified that he *"knew that by going to Oregon,* [*he*] *would be out of compliance with* [*his*] *registration*," but went anyway.

Appellant nevertheless suggests that, if properly instructed on actual knowledge, the jury could have concluded that appellant *thought* he understood the requirements, but *mistakenly believed* he was violating his registration obligations by moving to Oregon without notifying the Redwood City Police Department of his change in address. This argument fails because it is predicated upon appellant's contention that there was no evidence that he had a new address or location in Portland, Oregon, and that the duty under subdivision (f)(1) was therefore never triggered, which, as we explained in section I, *ante*, of this opinion, is incorrect.

The cases appellant cites, in which the courts have found failure to instruct on actual knowledge to require reversal, are also distinguishable. In each of these cases there was either a complete absence of evidence on the issue of actual knowledge, or a conflict in the evidence. (*People v. Edgar* (2002) 104 Cal.App.4th 210 [error required reversal where no evidence that defendant had actual knowledge that *additional* residence should be registered as a change in address, even when he continued to also stay at first registered address]; *People v. Jackson* (2003) 109 Cal.App.4th 1625 [same]; *People v. LeCorno* (2003) 109 Cal.App.4th 1058, 1068, 1070 [reversible error where defendant,

accused of failing to register an additional address in another county, testified he was given an incorrect explanation of the meaning of residence, and understood reference to "concurrent" address on registration form to mean address where he was currently staying].)

We conclude that the evidence of appellant's actual knowledge was so overwhelming that the error in failing to instruct the jury on this element was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Garcia, supra*, 25 Cal.4th at p. 755; see also *People v. Johnson* (1993) 6 Cal.4th 1, 45-46 [instructional error harmless where evidence so overwhelming that verdict would have been the same had the jury been correctly instructed].)

IV.

Instructions on the "New Address or Location" and "Five Working Days" Elements

Appellant next contends that, although the first paragraph of an instruction correctly informed the jury that a registrant "who changes his residence address or location . . . shall inform, in writing within five working days, the law enforcement agency . . . with which he last registered," it failed to specify that the information the registrant must provide is his "new address or location." The rest of the instruction following the paragraph appellant quotes specifies the elements, including that the jury must find "the defendant willfully failed to inform, in writing within five days, the law enforcement agency . . . with which he last registered of the new or additional residence address." It is axiomatic that instructions are to be read as a whole. Although the instruction on this element omitted to specify "or location," the jury, by referring to the introductory paragraph, could not have misunderstood that the duty to notify under subdivision (f)(1) includes the obligation to inform of the new address or location.

Appellant also observes that, in one part of the same instruction, the court stated the grace period for notification as "five days," whereas in the general definition of the offense it correctly described the grace period as "five working days." There was, however, no factual dispute as to *when* appellant notified the Redwood City police, and whether it was within the grace period. He failed to notify the Redwood City police of

his new address or location *at any time* during the 14-month period he was living in Portland, Oregon. Therefore, any possible confusion caused by the error in failing to repeat the qualifier "working" before the word "days" could not have been prejudicial.

Nor is there any merit to appellant's objection that the instruction incorrectly stated when the five-day grace period begins to run. The instruction he objects to correctly stated the elements of the offense as follows: "(1) The defendant was required to register as a sex offender pursuant to Penal Code section 290 due to a prior felony conviction; [¶] (2) The defendant *changed his residence address*; [¶] (3) The defendant willfully failed to inform in writing, *within five days*, the law enforcement agency or agencies with which he last registered, of the *new or additional residence addresses*." (Italics added.) The instruction therefore correctly stated that the grace period begins to run within five days of a change of address.

V.

Failure to Instruct on Violation of Section 290, Former Subdivision (a)(1)(B) as a Lesser Included Offense

Appellant also asserts that the court erred by failing, sua sponte, to instruct on the elements of a violation of section 290, former subdivision (a)(1)(B) (former subdivision (a)(1)(B)), now renumbered as subdivision (a)(1)(C), as a lesser included offense of a violation of subdivision (f)(1). Former subdivision (a)(1)(B) required that a person who has no residence address shall update his or her registration every 90 days with the local law enforcement authority in the jurisdiction where he or she is located at the time of the update.[14]

Former subdivision (a)(1)(B), however, is not a lesser included offense because a person can violate subdivision (f)(1) without violating former subdivision (a)(1)(B). (See *People v. Wright* (1996) 52 Cal.App.4th 203, 208.) Subdivision (f)(1) applies both to persons with or without a residence address, and requires a registrant to inform the law

[14] The 1999 legislation that renumbered this subdivision as (a)(1)(C) also changed the frequency with which a person having no residence address must update his or her registration from every 90 days, to every 60 days. (Stats. 1999, ch. 901.)

enforcement agency *where he or she last registered* of a change in address or location. Former subdivision (a)(1)(B) applies *only* to a person who registers with *no residence address,* and imposes the additional obligation, every 90 days, to update his or her registration with the local law enforcement agency in the jurisdiction *where he or she is located at the time the update is due.* A person *with* a residence address can violate subdivision (f)(1) without violating former subdivision (a)(1)(B) because he has no duty to update within 90 days. A person *without* a residence address can also violate subdivision (f)(1) without violating former subdivision (a)(1)(B) because he or she may fail to notify the law enforcement authority *where he or she last registered* of a change in address or location, yet update within 90 days his or her registration with the local law enforcement agency in the jurisdiction *where he or she is located at the time the update is due.*

In his reply brief, appellant advanced a different argument, that subdivision (a)(1)(B) is a "specific" statute that controls over the more general provisions of subdivision (f)(1). (See *People v. Coronado* (1995) 12 Cal.4th 145, 154.) Based upon well-established appellate principles, we decline to consider this new argument raised for the first time in appellant's reply brief, especially where, as here, appellant had ample opportunity to present every conceivable argument in his combined opening and supplemental opening briefs. (See, e.g., *Regency Outdoor Advertising, Inc. v. Carolina Lanes, Inc*. (1995) 31 Cal.App.4th 1323, 1333; *People v. McConnell* (1948) 86 Cal.App.2d 578, 581.)

VI.

Ineffective Assistance of Counsel

Appellant next identifies a series of omissions that restates each of the preceding claims of error as a claim of ineffective assistance of counsel. None of these omissions constitutes ineffective assistance, because it is not incompetent for counsel to fail to assert, or request instructions on, a defense that is not legally recognized or not supported by the evidence, and, in any event, appellant cannot demonstrate prejudice. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 783-784.)

The failure to argue that the evidence was insufficient to prove that appellant had a new residence address in Oregon was not prejudicial because the evidence that he did was strong. The evidence was overwhelming that he moved from his last registered address without notifying the Redwood City Police Department of this new address. Moreover, appellant's own testimony admitted that the reason he failed to comply with subdivision (f)(1) was not that he lacked a new address or location to report, but rather that he wished to avoid notification of his parole officer that he was absconding parole. The failure to assert a defense based on lack of actual knowledge, and to request instructions on this element, was not incompetent or prejudicial where, as here, the evidence of actual knowledge was overwhelming. Nor, was it incompetent to fail to request instructions on the elements of a violation of subdivision (a)(1)(B) because it was not a lesser included offense, or to fail to object to instructions that correctly stated the law or did not result in actual confusion or prejudice.

Appellant also suggests that counsel was incompetent for failing to assert a defense based upon the privilege against self-incrimination. He suggests this defense applied because, if he had complied with section 290, subdivision (f)(1), he would have been admitting that he was about to violate his parole and commit the federal crime of interstate flight to avoid being returned to custody for the parole violation.

The cases appellant relies upon, *Marchetti v. United States* (1968) 390 U.S. 39 (*Marchetti*) and *Grosso v. United States* (1968) 390 U.S. 62 (*Grosso*) are inapposite. In *Marchetti*, the defendant was convicted of failing to comply with federal regulations that required those engaged in the business of accepting wagers to register annually, post the revenue stamp received by registrants, and pay certain taxes and fees. (*Marchetti,* 390 U.S. at pp. 41-43.) The stamp was often used against registrants in wagering prosecutions. (*Id.* at pp. 44-48.) Under these circumstances, the registration requirements created a "real and appreciable," and not merely "imaginary and unsubstantial" hazard of self-incrimination. Therefore, the Court held that a defendant should be entitled to assert the privilege against self-incrimination as a defense. (*Id.* at p. 49; accord *Grosso,* 390 U.S. 62.)

The sex offender registration under section 290, however, is more akin to the California vehicle code section requiring a driver involved in an accident to stop and identify himself, to which the court in *California v. Byers* (1971) 402 U.S. 424 (*Byers*), refused to apply the privilege. The plurality opinion distinguished *Marchetti*, *supra*, 390 U.S. 39 and its progeny, and found no "substantial" risk of self-incrimination. The court explained that although the vehicle code defined some criminal offenses, the hit-and-run law was intended to promote driver financial responsibility, and not to facilitate criminal convictions. The regulated activity of driving a car involved in an accident was not inherently unlawful, and the statute was "indispensable" to implementing an "essentially regulatory" goal. (*Byers,* at pp. 430-431; see also *Craib v. Bulmash* (1989) 49 Cal.3d 475 [court distinguished *Marchetti* and refused to apply the privilege against self-incrimination to records under the reporting law, which was intended to regulate compliance with wage and hour laws]; *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1548-1557 [refusing to apply privilege against self-incrimination as a defense to failure to comply with a vehicle code section similar to the one at issue in *Byers*].) The court recognized that, in some circumstances, compliance with the self-reporting required by the vehicle code might lead to discovery of involvement in criminal activity. Nevertheless, "[w]hatever the collateral consequences of disclosing [a] name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." (*Byers,* at p. 432.)

Similarly, although section 290 applies only to persons who have suffered a criminal conviction for a specified sex offense, it only requires reporting of what is essentially *lawful* activity; i.e., the address or location of the registrant, and notification of any change of address or location. Section 290 also serves an important regulatory purpose of ensuring that the whereabouts of prior sex offenders are known to local law enforcement, and self-reporting is indispensable to that purpose. (See *Wright v. Superior Court, supra*, 15 Cal.4th at p. 527 ["the statute is thus regulatory in nature, intended to accomplish the government's objective by mandating certain affirmative acts"].) The mere provision of an address or location, or notification of a change of address or

location, under the sex offender registration law, is a neutral act, and a change of address is not *inherently* unlawful. It is only because, *in these particular circumstances*, appellant decided to move outside the jurisdiction where he was required to serve his parole, that a collateral consequence of reporting the move was the possible discovery of his parole violation.[15] Nevertheless, because informing the police of an address, or change of address, does not create a "real and appreciable" risk of self-incrimination, and section 290 has an important noncriminal regulatory purpose, the privilege is not a defense to a charge of failure to comply. It was, of course, not incompetent for counsel to fail to assert a nonmeritorious defense of self-incrimination.

VII.

Violation of Right to Jury Determination that Prior Conviction is a Felony

The amended information alleged that appellant committed a felony violation of subdivision (f)(1) as "a person required to register as a sex offender having been previously convicted of . . . Penal Code section 288 (b), on or about 12/29 1988." The information further alleged the section 288, subdivision (b) convictions, and several other felony convictions, rendered him ineligible for probation and qualified as strikes under the Three Strikes law.

The court instructed the jury that an element of the offense was that it had to find that appellant "was required to register as a sex offender pursuant to Penal Code section 290, due to a prior felony conviction." Appellant contends, in reliance upon *Apprendi v. New Jersey* (2000) 530 U.S. 466, that he had a right to a jury determination that his prior conviction was a *felony* conviction because that is an element of a felony violation of

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[15] By the same token, compliance with the reporting statute in *Byers*, *supra,* 402 U.S. 424, to which the court refused to apply the privilege of self-incrimination, could in some circumstances result in disclosure of criminal activity if, for example, the person driving turns out to have a revoked license, or is a criminal fugitive. Nevertheless, self-incrimination as a defense to compliance is only available where the statute regulates or requires reporting of inherently criminal activity, targets a particular group suspected of engaging in it, and has no other essentially regulatory goal.

section 290, pursuant to subdivision (g)(2).[16] He argues that right was violated because the court instead instructed the jury that the parties had stipulated appellant had a prior conviction that required him to register as a sex offender, and that the court found the prior conviction was for a felony. Appellant's position is that he stipulated only to the fact that the prior conviction was of a sex offense, and not that the prior conviction was a *felony*.

We need not reach the question whether appellant had a constitutional right to have the jury determine whether the prior sex offense conviction was for a felony, because appellant's stipulation included the fact that the prior conviction was for a felony.[17] The written stipulation states that, for the purpose of the jury trial, appellant stipulated to the fact that he had suffered "prior convictions" for "violations of Penal Code Section 288(b)." Section 288, subdivision (b) is, *by its terms*, a felony. Therefore, appellant clearly stipulated, not only to the fact that he had a prior conviction that required him to register as a sex offender, but also that it was a *felony* conviction. Appellant, however, also wanted the information and the stipulation "sanitized" so that the jury would not be prejudiced by any reference to the *specific* sex offenses of which he had been convicted. The written stipulation therefore also specified that the jury would only be informed that the parties "have stipulated that the defendant in this case has suffered prior convictions for sex offenses that require him to register as a sex offender pursuant to Penal Code § 290." In a conference on jury instructions, the court called to the parties' attention the fact that the language to be read to the jury did not specify that the prior conviction was a felony. Without objection from appellant, it was agreed that

[16] A willful violation of section 290 by a person who is required to register as a result of a misdemeanor conviction of one of the specified offenses is a misdemeanor, whereas a willful violation by a person who is required to register based upon a felony conviction, is a felony. (§ 290, subds. (g)(1) and (g)(2.)

[17] Appellant also expressly waived jury trial with respect to the prior convictions alleged as strikes, and in support of the probation ineligibility allegations and the section 667.5 enhancement. The court found them all true, including an allegation of the same section 288, subdivision (b) conviction, alleged with respect to the charged felony violation of subdivision (f)(1), as the felony offense that required appellant to register.

the court would also inform the jury that the prior conviction was for a felony. Although it is unclear why the court chose to inform the jury that the conviction was a felony in terms of a court "finding," the record is unequivocal that appellant *had stipulated* to the fact of a prior felony conviction that required him to register as a sex offender, and agreed that the jury could be so informed.[18]

VIII.

Equal Protection

Appellant next argues that it is a violation of his right to equal protection to punish his willful violation of subdivision (f)(1) as a felony (§ 290, subd. (g)(2)), whereas a willful violation of section 290, subdivision (a)(1)(C) (formerly (a)(1)(B)), consisting of failure of a person who is registered as having no residence address to update his or her registration within 60 days in the jurisdiction in which he or she is located, is punished only as a misdemeanor (§ 290, subd. (g)(6)).

"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) Appellant's contention fails because persons convicted of different crimes are not similarly situated. (*People v. Barrera* (1993) 14 Cal.App.4th 1555, 1565; *People v. Jacobs* (1984) 157 Cal.App.3d 797, 801-802; *People v. Macias* (1982) 137 Cal.App.3d 465, 473.) A person who violates subdivision (a)(1)(C) does not commit conduct that is the same or similar to that of a person who commits a violation of subdivision (f)(1), and there are reasons why the Legislature might rationally make the judgment that a willful violation of subdivision (a)(1)(C) should be punished less severely than willful violations of other registration requirements. Subdivision (a)(1)(C), by its terms, applies *only* to

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[18] In any event, there was no factual dispute to submit to the jury because section 288, subdivision (b) is, *by its terms*, a felony. Moreover, in the absence of a stipulation both to the fact of the prior conviction and that it was for a felony, the jury would not have been able to determine that the prior conviction was for a felony without being informed of the specific sex offenses of which appellant had been convicted, thereby risking precisely the prejudice he sought to avoid by his stipulation.

registrants who register with no residence address, in other words, who are homeless, and imposes upon them the obligation to update their registration more frequently than the annual update required of a person who has a residence address (§ 290, subd. (a)(1)(D)). The more frequent update specified by subdivision (a)(1)(C) is presumably imposed because it is more difficult for law enforcement to keep track of the whereabouts of a person with no residence address, and because such a person is more likely to move frequently. In recognition of the fact that the burden imposed upon a registrant under subdivision (a)(1)(C) is more onerous, yet, at the same time, the persons subject to it are coping with the conditions of homelessness, the Legislature may reasonably have concluded that, although a person subject to subdivision (a)(1)(C) must also comply with registration obligations applicable both to persons with or without an address, a violation of (a)(1)(C) should only be punishable as a misdemeanor.

IX.

Defendant's Sentence Is Not Cruel or Unusual

Appellant finally contends his sentence of 25 years to life for violation of section 290 constitutes cruel and unusual punishment in violation of article I, section 17 of the California Constitution and the Eighth Amendment to the United States Constitution.

A. The Federal Standard

The United States Supreme Court has stated that the Eighth Amendment of the United States Constitution "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271-272 (*Rummel*); *Solem v. Helm* (1983) 463 U.S. 277, 285-286 (*Solem*).) In making this determination, the court should "look to the gravity of the offense and the harshness of the penalty." (*Solem*, at pp. 290-291.) An intrajurisdictional and interjurisdictional comparison of punishments may also serve as a guide in the proportionality determination. (*Id.* at pp. 291-292.)

The federal case most relevant to our analysis is *Ewing v. California* (2003) 538 U.S 11 (*Ewing*). In *Ewing*, the court concluded that a sentence of 25 years to life for a third strike offense of felony grand theft, and prior strikes consisting of robbery and three

residential burglaries, was not "grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments." (*Id*. at pp. 30-31.) The Court determined that the Three Strikes sentencing scheme reflects the reasonable penological judgment of the California Legislature "that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making [this] choice." (*Id.* at p. 25.) Nor does the Eighth Amendment preclude the California Legislature from making a policy decision that the sentence of 25 years to life should be imposed even when the third triggering felony is not a serious or violent felony that would qualify as a prior strike. (*Id.* at p. 30, fn. 2].) In light of Ewing's recidivist criminal history, the State of California " 'was entitled to place upon [Ewing] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.' " (*Id.* at p. 30.)

Here, the absence of any inference of gross disproportionality is at least as strong as in *Ewing, supra,* 538 U.S. 11. Appellant's sentence under the Three Strikes law is based upon his current conviction, *and* upon his recidivism involving the commission of four prior serious or violent felonies. (§§ 667, subd. (e)(2)(A), 1170.12, subd. (c)(2)(A).) Appellant nevertheless argues that his current conviction was for a nonviolent offense, and that the statute violated, section 290, is merely regulatory. Our Supreme Court, however, has recognized the importance of enforcement of section 290 " 'to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]' [Citations.] Plainly, the Legislature perceives that sex offenders pose a 'continuing threat to society' [citation] and require constant vigilance. [Citation.]" (*Wright v. Superior Court, supra,* 15 Cal.4th 521, 527.)

The specific facts also demonstrate that appellant's offense was not a mere "technical" violation of section 290. (Cf. *People v. Cluff* (2001) 87 Cal.App.4th 991 [abuse of discretion not to strike priors where, among other things, violation of § 290 was a mere technical failure to update registration, but defendant did not commit violation in

order to evade police, and the police were still able to find him at last registered address].) Appellant admitted that he knew he was required to notify the police if he changed his address, and that he consciously decided not to notify them so he would not be stopped from absconding parole. As a result of his offense, he was able to abscond parole, and his whereabouts were unknown for nearly 14 months. To make matters worse, he returned to Portland, Oregon, where one of his victims resided, and the Redwood City police were unable to alert the local police of his presence in their jurisdiction. We have no difficulty concluding that, on these facts, his current offense, although nonviolent, clearly posed a potential threat to society.

Appellant's record of recidivism is also serious and lengthy. In addition to several other convictions, he had *four* prior convictions that qualified as strikes. In 1977 he was convicted in Oregon of sodomy. The victim was the 19-year-old niece of his fiancée. The facts of the offense involved restraining the victim with ropes, threatening her with a knife, and choking the victim to quell her active physical resistance, leaving the victim with rope burns and bruises on her neck. He was sentenced to 15 years in prison for this offense. In 1988 he was convicted of three counts of violating section 288, subdivision (b). These offenses were committed against his nine-year-old daughter, again using restraint and physical violence to subdue his victim. He showed no remorse, and minimized his relentless, repeated sexual assaults upon his daughter, claiming never to have achieved penetration. These convictions resulted in a 20-year prison term. Although his prior convictions are separated from each other by 11 years, and the current conviction was committed approximately 10 years after his last prior convictions, these gaps are attributable to the lengthy prison terms imposed, not his demonstrated ability to rehabilitate himself and live a law-abiding life. He also committed the current offense while on parole, approximately a year after his release.

It is true that appellant's current offense did not rise to the same level of gravity as the priors. Nevertheless, the Legislature may reasonably conclude, when a pattern of recidivism includes at least two prior serious or violent felonies, and the defendant commits another felony, the risk of reoffending is so high that it is not appropriate to

expose society to the risk of waiting until the defendant commits a third serious or violent felony before imposing a lengthy prison term. It is for the Legislature, not the courts, to set prison terms, and courts must give substantial deference to legislature in setting punishment for crimes. (*Ewing, supra,* 538 U.S. 11; *Harmelin v. Michigan* (1991) 501 U.S. 957, 998) (*Harmelin*).) The legislative decision not to require that the third felony conviction also be serious or violent is within the reasonable range of its penological judgment that it is preferable to have a sentencing scheme that places greater weight upon deterrence and preemption or incapacitation by incarceration than other recidivist sentencing schemes. (*Ewing*, at p. 28; *Harmelin,* at p. 999.)

No doubt the penalty of 25 years to life in prison is severe. Yet, when viewed in light of the facts and gravity of appellant's current conviction, together with the severity of his prior felony offenses and pattern of recidivism, and giving due deference to the penological judgment of the California Legislature, and the People of California through the initiative process, we conclude that the sentence imposed in this case is not one of those rare cases in which a sentence is so grossly disproportionate to the gravity of the offense that it violates the proscription for cruel and unusual punishment contained in the Eighth Amendment. It therefore is unnecessary to resort, for the purpose of appellant's federal constitutional claim, to the intrajurisdictional and interjurisdictional comparison, and analysis of the punishment. (*Harmelin, supra,* 501 U.S. at pp. 1005-1007.)

B. California's Proscription of Cruel and Unusual Punishment

Our analysis of the penalty in relation to the offense, including the defendant's recidivism and his personal and criminal history, is not substantially different under the California Constitution, which precludes a sentence that is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 478.) For the reasons we have already explained with respect to appellant's Eighth Amendment argument, our examination of the nature of the offense and the offender, "with particular regard to the degree of danger both present to society" does not support any inference of disproportionality that would shock the conscience.

(*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 87-88.) In *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1433, the court upheld a sentence of 25 years to life under the Three Strikes law against a claim that the sentence violates the California constitutional protection against cruel or unusual punishment, even when the third conviction was for petty theft, a nonviolent offense. We find nothing in the facts of this case that warrant a different conclusion.

Nor does an interjurisdictional and intrajurisdictional comparison of punishments, which are the second and third factors set forth in *In re Lynch, supra*, 8 Cal.3d at pp. 426-427 support the conclusion that the sentence in this case is so disproportionate as to shock the conscience. Appellant argues that his sentence is disproportionate because it is greater than those imposed for single, more serious crimes such as manslaughter, carjacking and rape. This argument, like the previous one, fails to recognize that the Three Strikes law targets recidivism. Thus, the commission of a single offense cannot be compared with the commission of multiple felonies. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512.) The Three Strikes law does impose a sentence that is the same as that imposed upon a person whose third strike consists of a more serious offense, such as manslaughter, carjacking or rape, but that decision simply reflects the Legislature's penological judgment that more weight should be place upon recidivism and deterrence under the sentencing scheme established by the Three Strikes law.

Appellant also argues that imposition of a mandatory 25 years to life sentence is disproportionate to the punishment he would receive in other jurisdictions. In particular, he asserts that in 24 states, a person with his prior convictions who fails to notify police of a change of address would merely be committing a misdemeanor. He acknowledges that in several states recidivist provisions could result in a life sentence, but argues the life sentence is not mandatory, and these jurisdiction do not deny or drastically limit the credits prisoners can earn. Preliminarily, we note that, pursuant to section 1385, the trial courts retain discretion to strike strikes "in furtherance of justice." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504, 529-530; *Martinez, supra*, 71 Cal.App.4th at p. 1515.) The fact that California's statutory scheme for felony recidivists is the most

severe does not compel the conclusion that it is unconstitutionally cruel or unusual. "[T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. Nothing in the prohibition against cruel or unusual punishment per se disables a state from responding to changed social conditions and increasing the severity with which it treats its recidivist felons." (*People v. Cooper* (1996) 43 Cal.App.4th 815, 827.) " 'This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct.' (*People v. Martinez, supra,* 71 Cal.App.4th at p. 1516.)" (*Romero, supra*, 99 Cal.App.4th at p. 1433.)

CONCLUSION

The judgment is affirmed.

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Stein, J.

We concur:

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Marchiano, P.J.

_____
Margulies, J.

Trial Court:	The Superior Court of San Mateo County
Trial Judge:	Joseph Bergeron
Counsel for Defendant and Appellant:	Richard Such First District Appellate Project
Counsel for Plaintiff and Respondent	Christopher J. Wei Deputy Attorney General